

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION

CLERK'S OFFICE U.S. DIST. COURT  
AT DANVILLE, VA  
FILED for  
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SEP 12 2005

JOHN F. CORCORAN, CLERK  
BY: H. McDonald  
DEPUTY CLERK

TYRONE LAMONT SMITH,  
Petitioner,

v.

UNITED STATES OF AMERICA,  
Respondent.

Civil Action No. 7:05cv00445

**MEMORANDUM OPINION AND  
ORDER**

By: Jackson L. Kiser  
Senior U.S. District Judge

This matter is before the court upon petitioner's motion for a certificate of appealability. By order of this court entered on July 30, 2001, petitioner's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 was denied as successive. A certificate of appealability may issue only if the applicant has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(1). A prisoner must demonstrate that reasonable jurists could find not only that his constitutional claims are debatable, but also that this court's decision was debatable or wrong. See Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). Furthermore, when the district court denies a petition on a procedural ground, the petitioner must also demonstrate that reasonable jurists would find it debatable whether the district court erred in its procedural ruling. Id.

In his original motion, Smith requested re-sentencing as a result of a new constitutional rule announced in the Supreme Court's opinions in Blakely v. Washington, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) and United States v. Booker, 125 S. Ct. 738 (Jan. 12, 2005) under Rule 60(b). However, I found that as Smith was attacking his underlying criminal conviction this motion was properly construed under § 2255. Furthermore, as this was a second or successive petition and as petitioner did not present any evidence of certification from the Court of Appeals for the Fourth Circuit, his motion was denied pursuant to 28 U.S.C. § 2244. Petitioner has still failed to produce

any evidence of certification. Thus, no reasonable jurist could debate the finding that this petition was successive nor that petitioner failed to present evidence of certification.

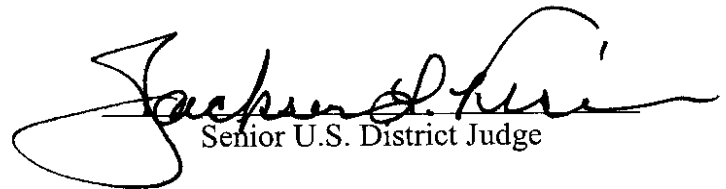
Therefore, it is hereby

**ORDERED**

that petitioner's motion for a certificate of appealability shall be and hereby is **DENIED**.

The Clerk of the Court is directed to send a certified copy of this Order to petitioner.

ENTER: This 12<sup>th</sup> of September, 2005.

  
Senior U.S. District Judge